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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 389.

ILLINOIS COMMERCE COMMISSION,
Petitioner.

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS COMPANY, LACLEDE STEEL COMPANY, OLIN INDUSTRIES, INC., OWENS-ILLINOIS GLASS COMPANY, SCULLIN STEEL COMPANY, INTERSTATE NATURAL GAS COMPANY and FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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November 13, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 360.

ILLINOIS COMMERCE COMMISSION,

Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS COMPANY, LACLEDE STEEL COMPANY, OLIN INDUSTRIES, INC., OWENS-ILLINOIS GLASS COMPANY, SCULLIN STEEL COMPANY, INTERSTATE NATURAL GAS COMPANY and FEDERAL POWER COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 131) is reported at 181 F. 2d. 833.

Jurisdiction.

The opinion and judgment of the Court of Appeals was filed May 9, 1950 (R. 131). The formal decree adopted in said judgment was entered July 15, 1950 (R. 141). Petitioner seeks to invoke this Court's jurisdiction under 28 U. S. C., Section 1254(1).

Question Presented.

Where a natural-gas company sells gas for resale and also for consumption, may it be awarded overcharges paid by it to a supplying natural-gas company when the amount of such overcharges concededly relates to natural gas purchased for direct sale for industrial consumptive use if no local law or regulatory process inhibits such distribution and the privately negotiated arms length contract of sale to the industrial consumer does not provide for a reduction in price?

Statute Involved.

Section 1(b) of the Natural Gas Act (52 Stat. 821, (1938), 15 U. S. C., Sec. 717(b)):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement.

The petition in this case seeks a review of the same Court order as sought in the petitions in Nos. 356 and 357. Petitioners in No. 356 are four industrial corporations in Illinois. Petitioners in No. 357 are three industrial corporations in Missouri and two in Illinois. Illinois Commerce

Commission, petitioner herein, appears in a representative capacity on behalf of all Illinois consumers, including petitioners in Nos. 356 and 357 which are located in Illinois. Except for certain unusual claims made by the individual petitioners, the issues in all three cases are essentially similar. Out of a total of fifty-five direct industrial customers only eleven opposed the distribution ordered by the Court below (R. 135-136) and only nine are here complaining. These few customers seek a windfall for themselves without any justification in law or equity.

This case involves that part of the order of the Court below awarding to the respondent, Mississippi River Fuel Corporation ("Mississippi") that portion of excess charges paid by Mississippi for gas purchased and sold to nine industrial customers directly for consumption. While the stay order was in effect, Mississippi had paid to Interstate Natural Gas Company, Incorporated ("Interstate") for gas purchased a total of $1,484,582.53 in excess of the rates prescribed by the Federal Power Commission. Of this sum, Mississippi had previously passed on to its utility distributing customers $244,103.70 under a settlement of a rate case with the Federal Power Commission (R. 112-119). Under the plan submitted to the Court of Appeals and agreed to by the Federal Power Commission, the Arkansas Public Service Commission and the Missouri Public Service Commission (R. 20-27, 143) (all regulatory bodies involved except petitioner) an additional $300,898.66 was passed on to utility distribution companies or their ultimate consumers of gas as local commissions would direct. These two sums totalling $545,002.36 were the total excess charges paid by Mississippi during the whole impoundment period for the purchase of gas sold by Mississippi *for resale* (R. 92).

Petitioner asserts that the remaining $939,580.17 of excess charges attributable to direct sales for consumptive use only should be awarded to the direct industrial consumptive users or, if not to them, then to the remote domestic users who never paid for such gas and never consumed it. The nine industrial consumers, petitioners in Nos. 356 and 357, claim $467,618.79 (petition in No. 356, p. 4).

The Illinois Commission apparently assumes to act on behalf of the Illinois direct industrial claimants (petition, p. 2). This, petitioner assumes to do despite an order of the Illinois Commerce Commission dated January 14, 1949 (R. 28-35) in which it was expressly held that the Illinois Commission had no jurisdiction over Mississippi's sales for direct consumptive use in the State of Illinois because the Illinois Public Utility Law did not confer such jurisdiction upon it. Subsequent to that time, the Illinois Commission issued a citation against Mississippi to show cause why its sales to direct consumptive users should not be regulated by the Illinois Commission (petition, p. 13). No action has been taken upon this citation proceeding nor has the previous determination of no jurisdiction been vacated or altered in any manner, nor has the local statutory law been changed in this regard. Not only is the Illinois Commission here collaterally impeaching its own determination of no jurisdiction, but it is before this Court in a representative capacity which, under its standing order and law, is beyond its jurisdiction. Therefore, petitioner is asking this Court to take a position in respect of its fundamental jurisdiction previous to the time when it itself asserts it. It would appear, therefore, that the Illinois Commerce Commission is without authority so to appear.

Fundamentally, also, as pointed out by the Court below, the Illinois Commerce Commission is not in position (even

if it did possess rate regulatory jurisdiction over these direct consumptive sales) to award any reparations or make any type of retroactive rate order against Mississippi (R. 139-140). Under Illinois law, a reparation claim must be filed within one year from the date of furnishing the service (petition, p. 17).

Argument.

The substance of petitioner's contentions is that the Court below failed to carry out the mandate of this Court in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577 and that Mississippi could share in the impounded funds only (1) if it had been earning less than a reasonable return upon the direct industrial consumptive sales (which are outside of the rate regulatory provisions of the Natural Gas Act), or (2) if it had passed the rate reduction on to its customers.

Mississippi, on the other hand, contends that inasmuch as its direct industrial rates are not subject to any regulation (either state or federal) and are the result of "private and arms length negotiations under the compelling pressures of other competing fuels" (R. 138-139), it should not be required to make any refunds to these few large industrial customers where there is no contract or regulatory requirement that it do so.

At the outset, it must be noted that Mississippi has a dual role so far as its sales of gas are concerned:

> (1) As a wholesaler or seller of gas for resale in interstate commerce: these sales admittedly are subject to the rate regulatory jurisdiction of the Federal Power Commission; and
>
> (2) As a direct seller of a commodity: such sales have been held by this Court to be governed by local law if it exists (*Panhandle Eastern Pipe Line Com-*

pany vs. *Public Service Commission of Indiana,* 332 U. S. 507).

The Illinois Commerce Commission determined by order dated January 14, 1949 that under the regulatory law of that state Mississippi was not engaged in the activities of a "public utility", but rather sells gas directly for consumption under private contracts; and these activities "do not represent a public use within the meaning of Section 10 of 'An Act concerning public utilities'" (*Illinois Commerce Commission* v. *Mississippi River Fuel Corporation,* 77 PUR NS 12 (Ill. Com. Comn., 1949)) (R. 34-35). The Illinois Commerce Commission, accordingly, found that it did not have jurisdiction over the sales directly for consumption. It is this dual role which this Court previously recognized when this matter was before it, but which apparently petitioner fails to comprehend. Evidence of the fact that this Court previously recognized the dual role and spoke in the main only of the sales subject to Federal Power Commission jurisdiction is found in such pronouncements of the Court as:

> "* * * The claims of these pipeline companies to the fund are therefore determinable solely with reference to federal law, since the Natural Gas Act * * * is designed to regulate the segment of the industry occupied by such distributors. * * * We may not therefore sustain the action of the Court of Appeals unless it is clear as a matter of federal law that the pipe line companies are entitled to the fund" (336 U. S. at 580-581).

In dealing with industrial users, this Court stated:

> "* * * We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.

> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it. If clear and speedy state remedies are available, the federal court might hold the fund until those having the final say on the state law questions have spoken" (336 U. S. at 583).

In stating the conditions under which the pipe line companies could participate in the fund, this Court was dealing with the sales of a pipe line subjejct to federal law and, therefore, with the status of the pipe line as a natural-gas company under the Natural Gas Act. In stating that the Court below should "look beyond those companies for the rightful claimants of the fund" it was speaking of "those companies" as natural-gas companies under federal law. Consequently, the instruction of this Court was followed by the Court below when it looked beyond Mississippi as a federal natural-gas company to the status of Mississippi as a direct seller of gas under state law. Applying the local law the Court found that it could render no other judgment than to award to Mississippi the impounded funds in question (R. 139-140).

I.

The decision below is clearly correct and conforms to this Court's mandate.

This Court, when the general refund matter of Interstate was before it (336 U. S. 577), was concerned primarily with the part of the fund accumulated from excess charges for gas which found its way to resale channels. In respect thereof, this Court held federal law (i.e., the Natural Gas Act) to be determinable of a natural-gas company's right to keep this part of the fund. In consideration of the dual

role of a natural-gas company like Mississippi, the general principles pointed out in the introduction to the argument are to apply.

In effect, the Court below had only one problem, i.e., what to do with the excess payments for gas not sold for resale but consumed by the immediate purchaser. As to those sales which Mississippi made for resale there was no problem. Mississippi had passed on this entire amount. It had then "done all that was in their power to effectuate the policy of the Act in this regard" (336 U. S. at 582).

As to the one problem before it, the Court below had been admonished by this Court to reconstruct the situation and undo, to the extent judicially possible, the effect of granting the stay to Interstate, i.e., application of equitable principles. In so doing, the Court had to inquire "whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority" (336 U. S. at 583).

In the reconstruction process the Court below determined that the contracts did not give any direct industrial consumer a refund right; nor did local regulatory authority give any such right—at least during any time material here. We do not understand petitioner to object to these determinations. In fact, it was admitted in the Court below that the contracts which Mississippi has with its industrial users of gas contained no provisions for price relief or reduction (R. 133-134). As to the second position, it already has been pointed out that the determination of the petitioner had been that it had no jurisdiction over Mississippi's direct industrial sales for consumptive use. Even if it had, it would now be unable to recoup for any consumer the amount of excess charges if they, in fact, existed (Ill. Rev. Stat., 1949, Ch. 111⅔, §76, reprinted at page 17 of petition).

The nub of petitioner's attack upon the decision below rests upon an assertion that the Court had determined when

this case was here on the general question of refunds that a natural-gas company purchaser from Interstate was not entitled to any of the excess charges unless it had been earning less than a fair rate of return. We leave it to this Court to determine exactly what it held, but it is obvious to us that no such holding can be gleaned from the opinion of the Court or from any opinion previously filed. Where this Court speaks of making inquiry beyond, for example, Mississippi, it is speaking in terms of the policy of the Natural Gas Act (336 U. S. 577, 582) which, of course, as the petitioner recognizes (petition, p. 5, fn. 3) is limited so far as sales are concerned to sales for resale only. Not by any stretch of the imagination does the policy of the Act in respect of sales apply to sales for consumptive use (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507).

Petitioner here, also, speaks of Mississippi's rates being too high during the accumulation of this fund as demonstrated by the Federal Power Commission's order against Mississippi and that the Federal Power Commission had determined that Mississippi was earning more than a fair rate of return on all its business. Actually, the Federal Power Commission assumed to do no such thing, but determined only that 6% "is the maximum rate of return which can be called fair for Mississippi to earn from its regulated sales to the utility customers" (4 F. P. C. 340 at 351).[1] The Federal Power Commission in this case in speaking of the direct sales for consumptive use notes that:

[1] The Power Commission adjusted actual expenses downward and used speculative future expectations in business as the reason for not using expenses as actually incurred. The full text of the Commission's Order and Opinion indicates that 1943 was used as a test year for sales volumes and gross revenues alone and the Commission did not make any conclusions as to the actual 1943 rate situation; nor did the Commission go beyond the year 1943 in any determination made by it as to actual earnings (see 4 F. P. C. 340, 346-351, 360).

> "This is a matter primarily of contracts between Mississippi and such industrial purchasers, unless state regulatory authorities have jurisdiction and authority to determine and fix the rates and charges which are to apply to such sales of gas" (R. 99).

It is in the second part of the Court's opinion in the previous review (336 U. S. 583 *et seq.*) that the Court deals with the question of the two uses of gas or the dual role of a natural-gas company claimant. In that second part the Court clearly recognizes that the amount of reduction in rates could reach industrial users only because of contract or because of the state or local regulatory authority.

Apparently recognizing the inherent weakness in its argument, petitioner suggests that it would not be equitable for the Court below to reconstruct the situation that would have pertained had no stay order been granted (petition, p. 9). Of course, it is the application of equitable principles which compels the reconstruction of the situation as though no stay had been granted. This Court previously held that while no one can know for a certainty what would have happened had no stay been entered, the Court below "must make its prognostication, whether an excursion into federal or state law questions is entailed" (336 U. S. 584). This is exactly what the Court below did. Having had removed any consideration of the problem of sales for resale which was the only sphere for the application of federal law, it went into the only questions remaining. It determined after admission that no contractual provisions gave any legal or equitable right to the industrial claimants. The Court then inquired into the Illinois law "relying on such sources of local law as may be available, including information from state regulatory agencies". The Court was informed as to the Illinois law as it had been expounded by

the state regulatory agency having to execute such law. Only after this "excursion" into state law questions did the Court determine that the state law was such that Illinois would not have awarded any direct industrial user of gas the amount of excess charges paid by Mississippi to Interstate (R. 140).

To shore up this specious contention petitioner tacitly asserts as a fact a present affiliation between Interstate and Mississippi (petition, pp. 9-10). This affiliation no longer exists and has not existed during any of the time in which this refund controversy has been going on. Petitioner was more cautious of the truth when in a previous part of its brief it advisedly asserted affiliation only during the time the fund was accumulated in the Court below during the Interstate review proceeding (petition, p. 3).

Petitioner asserts as a more equitable plan the distribution of excess charges paid for gas sold for consumption to utility distributing companies which resold the gas. It cites cases in which this procedure allegedly had been followed. The situation in all of the cases cited in petitioner's brief in this respect involved instances where the gas was not used by the immediate purchaser from the pipe line company, but was in fact resold in part to industrial users. As pointed out by the Federal Power Commission, the situation in these instances is not parallel with that obtaining here (R. 99-102). Petitioner finally concludes that in order to do equity the exact parallels of the situations involved in other cases should not control but that the comparative earnings and conditions of the intermediate companies must be examined. It is difficult to comprehend why this is so since we are dealing here only with a product sold on a purely competitive basis and outside of the ambit of control of the Federal Power Commission and outside of the statu-

tory control of petitioner. In effect, petitioner is requesting a strictly controlled economy in the operations of a company over a portion of its business as yet unregulated. The rates charged to the direct industrial consumers of Mississippi are "the fruit of private and arms-length negotiations under the compelling pressures of other competing fuels" (R. 138).

As further error, petitioner asserts that the Court below should not have relied upon an order of the Illinois Commerce Commission dated January 14, 1949 (R. 28-36) from which the Court concluded that no relief to the direct industrial consumers was afforded under the Illinois law. The answer to this is that the Court below made use of "such sources of local law as may be available, including information from state regulatory agencies" (336 U. S. at 584).

The final plaint of petitioner in its argument that the Court below failed to follow the mandate of this Court is that the decision below puts a premium on litigation of rate orders. Suffice it to say, neither Interstate nor any affiliate of Interstate will realize one cent of benefit from the distribution of the funds as made by the Court below. In fact, the distribution ordered by the Court below gives exact and accurate attention to the policy of the Natural Gas Act and to the contractual and state legislative situation existing at the time. The Court has applied the equitable rule of restitution (see *Atlantic Coast Line R. R. Co.* v. *Florida,* 295 U. S. 301) by reconstructing the situation as though no stay had been granted. Thus, excess charges paid by Mississippi for gas which it resold have been passed on to utility distribution companies for distribution as their respective state agencies may direct. In fact, the distribution of the money to Mississippi's resale customers and thence to remote domestic and industrial consumers by Mis-

sissippi's consent goes beyond what Mississippi would have had to have given up if no stay had ever been granted.[2] Had no stay ever been granted, Mississippi under the state of the law would never have been required to reduce any price at which it sold gas for direct consumption. Therefore, the reconstruction process requires the return of this total fund to it.

II.

There is no question involved in this petition relating to a question of federal law and the Natural Gas Act which has not already been determined by this Court.

Petitioner asserts that the questions involved should be settled and the rights of ultimate consumers in the impounded funds should be determined. Of course, these were the questions which concerned this Court in the previous refund appeal (336 U. S. 577). Apparently, the only conflict existing here is the one between petitioner's notions and the holdings of this Court previously made. The attempt upon the part of the petitioner to torture the opinion and judgment of the Court below into an apparent conflict with the conclusions of this Court exposes nothing of inconsistency of action by the Court below but does expose

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[2] The sum of $300,898.66 represents excess charges paid by Mississippi to Interstate for gas which Mississippi subsequently sold for resale during the period June 1, 1943 to January 20, 1946. January 20, 1946 was the date the Federal Power Commission rate reduction order against Mississippi was effective. Since the Power Commission has no reparation authority *(Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591, 618), had no stay been entered in this case, Mississippi would have been entitled to keep this sum. It agreed, however, to pass it on to ultimate resale consumers. The sum of $244,103.70 had previously been passed on by means of reduced rates for an interim period as indicated above in the Statement (p. 3, *supra*).

a tendency on the part of the petitioner to ignore what this court has already stated and what the Court below actually did. The only question remaining in the Court below was whether Mississippi or its immediate consumptive users should receive an allocable portion of the impounded funds. All questions are of importance to litigants but the Court below, upon the basis of this Court's opinion which became the law of the case, arrived at a decision not only consistent therewith but in complete conformity therewith. Since all questions of disposition of the fund as it related to sales made by Mississippi *for resale* were resolved by agreement in favor of ultimate consumers of gas, there remained only the question of activity in the sphere where state regulatory authority is still exclusive. In relation to this state sphere, the Court noted and found upon the best basis obtainable that no Illinois immediate consumer of gas would have received a portion of the impounded funds since Illinois did not and has not yet to this date asserted any rate regulatory authority over Mississippi. The Court below also held the same as to the Missouri law. The question of contractual right to refunds has been conceded against the claim of the petitioner in all instances. Not only was the Court below acting consistently with the law of this case as previously prescribed by this Court, but also was acting consistently with *Central States Electric Co.* v. *City of Muscatine, et al.,* 324 U. S. 138, as construed by this Court under the law of this case. In effect, all that was left to the Court below was a determination of disposition of the fund under either contract or state regulatory law. The conclusions reached were clearly correct and authoritatively supportable.

How any further consideration of this controversy which has already been before this Court can serve to reduce rate litigation or discourage affiliation between gas pipe line

companies is indeed difficult to imagine. The specious attempt of petitioner to cast an aura of importance upon this case would require the assumption that all business activities of natural-gas companies are carried on for the purpose of fostering rate controversies of long duration.

This Court has spoken upon every principle urged by petitioner. In effect, petitioner is asking the Court to re-examine its own conclusions and to overrule the law of this case.

Conclusion.

For the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 360

ILLINOIS COMMERCE COMMISSION,
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v.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,
Respondents.

STATEMENT OF RESPONDENTS GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY AND OWENS-ILLINOIS GLASS COMPANY

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IN THE

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OCTOBER TERM, 1950

ILLINOIS COMMERCE COMMISSION, *Petitioner,* v. MISSISSIPPI RIVER FUEL CORPORATION, *et al.*, *Respondents.*	No. 360

STATEMENT OF RESPONDENTS GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY AND OWENS-ILLINOIS GLASS COMPANY

These respondents, direct industrial customers of Mississippi River Fuel Corporation and petitioners in No. 356, agree that the judgment of the Court of Appeals should be reviewed, for the reasons stated in their petition for writ of certiorari. Respondents disagree with certain of the arguments made in the petition of Illinois Commerce Commission, but reserve discussion thereof until the petitions for writs of certiorari are granted.

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